

BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WASHINGTON

In the Matter of the Application
regarding the Conversion and
Acquisition of Control of Premera Blue
Cross and its Affiliates

Docket No. G02-45

SPECIAL MASTER'S ORDER ON
WSMA'S REQUEST FOR
DISCLOSURE OF ATTORNEYS' EYES
ONLY MATERIALS

This matter comes before me pursuant to the "Special Master's order on WSMA's request for emergency hearing re disclosure of Attorneys' Eyes Only materials," dated October 29, 2003. I have considered WSMA'S "Request for emergency hearing regarding disclosure of material designated attorneys' eyes only," dated October 26, 2003; "Premera's procedural response to WSMA's request for an emergency hearing," dated October 28, 2003; "WSMA's reply to Premera's procedural response to WSMA's request for an emergency hearing," dated October 28, 2003; "Premera's substantive response to the WSMA's request for an emergency hearing re disclosure of attorneys' eyes only materials," dated October 31, 2003; "WSMA's reply to Premera's substantive response to WSMA's request for the disclosure of attorneys' eyes only material to its experts," dated November 3, 2003; and "Premera's response to WSMA's reply re disclosure of AEO materials to WSMA's experts," dated November 4, 2003.

The Commissioner's Eighth Order: Protective Order sets out the procedures by which Attorneys' Eyes Only ("AEO") materials may be disclosed to expert witnesses. Pursuant to such procedures, the WSMA notified Premera on October 21, 2003 of its intention to disclose those portions of the draft and final OIC Staff's Consultant Reports designated by Premera as AEO materials to its designated expert witnesses, Jeff Collins, M.D. (WSMA's President) and Robert Perna (WSMA's Director of Health Care Economics). Premera timely objected on October 24, 2003 to such disclosure.

The WSMA states that the sole reason that it did not retain outside experts for purposes of this conversion proceeding was to conserve its resources. According to the WSMA, both Dr. Collins and Mr. Perna have agreed to sign the form of declaration, Appendix A to the Protective Order, thereby providing sufficient assurance that the confidentiality of Premera's AEO materials will be preserved.

Dr. Collins maintains an active practice in internal medicine in Spokane. He is a member of Eastern Washington's largest internal medicine practice, where he and his colleagues participate in Premera's provider network. Dr. Collins is currently serving a one-year term as President of the WSMA, after spending many years as an active member of the WSMA Board. He has served as President of the Spokane County Medical Society and has held prominent positions at Spokane area hospitals.

Mr. Perna has served as WSMA's Director of Health Care Economics for more than ten years. He works regularly with Washington State physicians and office managers to improve the economic vitality of their practices, as well as with the health care economics departments at the University of Washington and Washington State University.

The Protective Order herein, Paragraph 3(b)(ii)(3), provides: “If the person for whom the disclosure is sought is an expert or consultant of the party requesting the disclosure, then the party objecting to the disclosure shall have the burden of proving to the Special Master the inappropriateness of such disclosure.” The burden shifts if a party seeks disclosure of AEO materials to a person who is not its expert or consultant.

The Commissioner’s Fourth Order, which granted intervener status to the WSMA and others, recognized that the interveners represent significant interests in this conversion proceeding. The Fourth Order, at p. 7, grants considerable scope to the issues about which the interveners “can present information, a perspective, and expertise different from or broader than that provided by the OIC Staff or Premera.” The WSMA, in its motions seeking intervener status, articulated a broad range of issues as to which it wished to provide input, including the impact of conversion on physician reimbursement, primary care, and prescription drug coverage.

Given this background, I believe that both Dr. Collins and Mr. Perna have sufficient education and experience concerning intervener-related issues to qualify as experts in this proceeding. Premera therefore has the burden under the Protective Order, Paragraph 3(b)(ii)(3), to prove to the Special Master the inappropriateness of disclosure to Dr. Collins and Mr. Perna of AEO materials.

The Protective Order recognizes the risk that serious damage could be caused by disclosure of the parties’ trade secrets and non-public proprietary business information. Consistent with this concern, the Protective Order establishes the category of AEO materials (a category that is common in litigation involving sensitive materials).

The very title “Attorneys’ Eyes Only” suggests that attorneys, but not their clients, will be permitted access to certain sensitive materials.

The Protective Order, at pp. 15-16, Paragraph 3(b), sets out a limited group of persons to be provided access to AEO materials—the Commissioner and his counsel, the Special Master, the Washington State AG, the OIC Staff, the Alaska Division of Insurance Staff, the Parties’ Counsel, court reporters and videographers, photocopying or imaging services, persons directly connected to a particular AEO document (possessor, drafter, recipient), and deponents. In essence, aside from expert witnesses, the Protective Order generally provides access to AEO materials only to the decision-makers, to the Parties’ Counsel, and to those who directly assist them.

In this context, I believe that the disclosure of AEO materials to experts, such as Dr. Collins and Mr. Perna, who maintain significant leadership and/or policy roles with a party would be inappropriate. Such disclosure would create an unacceptable conflict between such experts’ duty, pursuant to their Appendix A declarations, to maintain the confidentiality of Premera’s AEO materials and their duty to the WSMA (and in Dr. Collins’ case, to his medical practice). To permit such a conflict would be inconsistent with the intent of the Protective Order.

In sum, though I do not question Dr. Collins’ or Mr. Perna’s personal integrity, I believe that disclosure to them of AEO materials would be inappropriate under Paragraph 3(b)(ii)(3) of the Protective Order. Dr. Collins and Mr. Perna shall therefore not be permitted access to AEO materials.

The present Order does not consider pending challenges to Premera's AEO and Confidential designations, which could result in further access by Dr. Collins and Mr. Perna to materials now designated AEO. Such challenges are expected to be fully briefed and ripe for consideration in the near future.

DATED this 5th day of November, 2003.

George Finkle
Superior Court Judge, Retired
Special Master